and not the special active use, confidence or trust. Brooke's Note, then, should be read thus: "If he says that the feoffees shall take the profits and deliver them to J. N., this does not make a use in J. N." (meaning a use executed by the Statute, for that is undoubtedly what Brooke was talking about), because J. N. had not the common use, with the right of possession, but a mere right to an accounting, "for he never has them [the profits] unless by the hands of the feoffees". And we may believe that Brooke, if he had been pressed, would have said, as Spence said at a later day, (I Spence, Eq. Jur., 466), that the common use was in the feoffees, since it was not in J. N. and did not result to the feoffer, and since they were to have possession and take the profits in the first instance. He would not have felt that there was repugnancy here, as in Tyrrel's Case, for the common use in the feoffees was a different thing from the special use declared to J. N.

The attempt here is merely to explain the genesis of the doctrine of the active trust in the case of the direction to collect and pay over the profits. Undoubtedly, at a later time, with the advent of the purpose theory, and aided by the lapse of many of the interests which were infringed by the use, the doctrine comes to have a scope which cannot be explained in the foregoing manner.

If these conjectures be correct, then the story of the development of equitable interests from merely personal rights to property rights must be told in two chapters, first of the passive use which in the fullness of its development was struck down, as an equitable institution, by the Statute, and second of the active use which, by reason of its immaturity, was saved from the Statute and pursued its more gradual growth. When the passive use was re-established, under the name of trust, the conditions which had favored the "reifying" of the passive trust in the earlier period had so far disappeared that it partook of the nature of the active trust. E. N. D.

FULL FAITH AND CREDIT AND JURISDICTION.—The judgment of a sister state, when assailed by collateral attack, is often said to occupy a position intermediate between foreign and domestic judgments. Though the older American cases were inclined to examine into the merits of any foreign judgment, the present tendency is toward the adoption of the English view according to which a foreign judgment may be attacked collaterally only for want of jurisdiction or fraud. Dicey, Conflict of Laws (ed. 2) Ch. XVII; see note to *Tremblay* v. *Aetna Life Insurance Co.*, 97 Me. 547, in 94 Am. St. Rep. 521, 538. But whereas any statement of jurisdictional facts in a foreign judgment is presumptive only, a domestic judgment is free from collateral attack on the ground of jurisdiction, except where lack of jurisdiction appears upon the face of the record. 1 BLACK, JUDGMENTS (ed. 2), § 274. The courts of New York have declined to accord this favoured position to domestic judgments and apparently make no distinction between domestic judgments and those of a sister state in this matter. *Ferguson* v. *Crawford*, 70 N. Y. 253, 26 Am. Rep. 589. In view of the so-called 'full faith and credit clause' of the constitution (Art. IV, §1), it is difficult to see why the judg-

ment of a sister state should be open to any form of collateral attack to which it is not open in the state where the judgment is rendered. This would seem to follow from the familiar statement of Chief Justice Marshall in *Hampton* v. *McConnel,* 3 Wheat. 234 (affirming the doctrine of *Mills* v. *Duryee,* 7 Cranch 481), which in the opinion of Justice Holmes is still a correct exposition of the law. *Fauntleroy* v. *Lum,* 210 U. S. 230, 236-7.

At all events it is clear that the judgment of a sister state may not be attacked collaterally upon the merits, and accordingly it becomes important to determine what matters are jurisdictional. Ordinarily the line of demarcation between the two is easily drawn, but when the judgment is rendered by a court of general jurisdiction in pursuance of a statutory or constitutional provision, the problem of delimiting jurisdiction becomes acute. Justice Holmes in *Fauntleroy* v. *Lum, supra,* has stated this very neatly: "No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain. One goes to the power, the other only to the duty of the court. * * * Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense. When it affects a court of general jurisdiction and deals with a matter upon which that court must pass, we naturally are slow to read ambiguous words, as meaning to leave the judgment open to dispute, or as intended to do more than fix the rule by which the courts should decide." Any reasonable doubt, then, should be resolved in favour of jurisdiction, and it is encouraging to find that in the most recent case in which this question has been presented to the Supreme Court the majority of the justices took this view.

Under the law of Minnesota, if execution on a judgment against a domestic corporation is returned unsatisfied, the court at the suit of a judgment creditor may sequestrate the property and appoint a receiver for the same. If in such suit the receiver presents a petition asserting that any constitutional or statutory liability of the stockholders exists and that resort thereto is necessary, the court may upon proper hearing make an order ratably assessing the stockholders on account of such liability and direct that the assessment be paid to the receiver. The court's order is made "conclusive as to all matters relating to the amount, propriety and necessity of the assessment" (Rev. Laws 1905, §§ 3173, 3184-3187), and if payment is not made the duty devolves upon the receiver of enforcing the court's order against defaulting stockholders wherever found. The order which produced the present controversy was made by the Minnesota court in a sequestration suit against the American Biscuit Company of Crookston, a Minnesota corporation. The receiver brought suit upon this order against a defaulting stockholder in North Dakota. The defendant contended that under the terms of the provision of the constitution of Minnesota (Art. X, § 3), which imposed a liability upon stockholders of corporations "except those organized for the purpose of carrying on manufacturing or mechanical business", the American Biscuit Company belonged to the class whose stockholders were excepted from liability, and that hence the Minnesota court was without

jurisdiction to make the order in question. This argument prevailed in North Dakota (32 N. D. 536); upon appeal to the Supreme Court of the United States it was held (Justices Clarke, Pitney and Brandeis, dissenting), that the court of North Dakota did not give to the proceeding in Minnesota the full faith and credit to which it was entitled under the constitution and laws of the United States. *Marin* v. *Augedahl* (1918), 38 Sup. Ct. 452.

This decision seems eminently sound. The Minnesota court, by the law of its organization, was empowered to take cognizance of, hear and determine the sequestration suit and the receiver's petition for an assessment. Clearly it had jurisdiction of the subject-matter of the suit. *Cooper* v. *Reynolds,* 10 Wall. 308, 316. Whether or not the stockholder against whom the order was sought to be enforced in North Dakota was personally a party to the original suit in Minnesota does not appear, but it is a matter of no consequence. The rule in Minnesota, which is also the general rule, is that, as a stockholder, he was sufficiently represented by the corporation to be bound by the order so far as that order determined the character and insolvency of the corporation and the propriety of the assessment. *Hawkins* v. *Glenn,* 131 U. S. 319; *Bernheimer* v. *Converse,* 206 U. S. 516. See also *Royal Arcanum* v. *Green,* 237 U. S. 531. It follows that the Minnesota court had jurisdiction of the subject-matter and the person. The defendant, therefore, was driven to the contention that Article X, § 3 (quoted *supra*) of the Constitution of Minnesota was directed to the jurisdiction of the court and not to the merits of the decision. He was able to show by several Minnesota cases; *e. g., Hastings Malting Co.* v. *Iron Range Brewing Co.,* 65 Minn. 28 (manufacture and brewing of lager beer); *Vencedor Investment Co.* v. *Highland C. and P. Co.,* 125 Minn. 20 (generating electricity), that the original order in Minnesota was incorrect. If the brewing of beer or generating of electricity entitles a corporation, as a manufacturing concern, to exemption from the constitutional provision, it requires some hardihood to deny the "manufacture" of biscuits. Such a finding was, of course, implicit in the order. But if the order was erroneous, it should have been corrected by application to the court which made it, or by appeal. The constitutional proivison does not aim to deal directly with the jurisdiction of courts; rather does it declare a general rule of liability for stockholders of corporations, excepting therefrom corporations of a certain class. So far as mere words go, the Statute of Frauds might seem to apply to jurisdiction; yet it is doubtful if any court ever regarded that statute as affecting aught save the merits. Only by a strange distortion of language can the constitutional provision be regarded as jurisdictional. The effort of Justice Clarke in his dissenting opinion to support such a proposition is far from convincing. He laid great stress upon a number of Minnesota cases, of which *Dwinnel* v. *Kramer,* 87 Minn. 392, is typical. It was there held that a policy holder in an insolvent mutual insurance company, against whom a general assessment on the policy holders was sought to be enforced, might successfully defend upon the ground that his policy was an "ordinary contract of insurance" issued on receipt of a cash premium and did not conform to the general plan. In other words he was allowed to put forward a personal defense. So too an alleged stockholder

might show that in fact he was not a stockholder or that he had paid the assessment. Such decisions do not call in question the jurisdiction of the court which ordered the assessment. They do not involve the problem of the principal case.

The effect of this decision appears to be that the judgment of a state court is conclusive throughout the Union as to all questions upon which it would be conclusive in the state where it is rendered. It affords consequently an interesting commentary upon a common interpretation put upon two much discussed cases: *Thompson* v. *Whitman*, 18 Wall. 457, and *National Exchange Bank* v. *Wiley*, 195 U. S. 257. W. T. B.

THE CONTENT OF COVENANTS IN LEASES.—Among the many troublesome problems in law those arising out of "covenants running with the land" are not the least. It is quite clear that in order for a covenant to "run" there must be an intimacy of relationship between it and the land, or, more properly, the estate, with which it passes. It is, then, vitally important to consider in each case the subject matter, the content of the covenant, and this matter of relationship.

Until recently courts and writers have with unfortunate unanimity contented themselves with laying down the familiar formula, "The covenant must touch and concern the land". Not until Professor Bigelow published his article on "The Content of Covenants in Leases", 12 MICH. L. REV. 639, 30 LAW QUART. REV. 319, did the subject receive in print the analysis and careful consideration it deserved.

A recent English case, *Barnes* v. *City of London Real Property Co.* (1918), 2 Ch. 18, however fully one may agree with the conclusion arrived at, is a good example of the lack of intelligent analysis so common in these cases. The lessee there sued the assignee of the lessor for breach of a covenant by the lessor to provide a housekeeper to keep the demised office in order. Sargent, J., said, "Then there comes the question whether the obligation ran with the land. The Conveyancing Act of 1881, s. 11, enacts that the obligation of a covenant entered into by a lessor with reference to 'the subject-matter of the lease' shall bind the reversionary interest. Was this an obligation with reference to the subject-matter of the lease? I do not think the law was intended to be altered at all by that enactment as regards the character of the obligation. I think the words of the statute expressed the same idea as that conveyed by the old phrase 'touching the land.' After considering the various authorities which have been cited, and particularly the case of *Clegg* v. *Hands* (44 Ch. D. 503), I cannot entertain a doubt that this obligation to clean, or to clean and dust by means of the provision of a housekeeper for the purpose, is something with reference to the subject-matter of the lease; certainly it has at least as close reference to the subject-matter of the lease as an obligation not to sell any beer on the property except beer provided by the lessor. In my judgment this is clearly something that touches the subject-matter. It affects the value of the rooms for the purpose for which they were let while in the occupation of the lessees. It seems to me